91-1460

Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KARL EASTON M.D.,

Petitioner,

vs.

CLARENCE J. SUNDRAM, PAUL STAVIS, WALTER E. SUARACK, JOHN J. RIBALTOWSKI, BRUCE E. FEIG, FRANCINCE COURNOS, PAUL GLICKMAN, LOUIS J. PATACK, KATHLEEN SWEENEY, and IRENE MARGOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a claim for malicious prosecution by state officers give rise to a cause of action under 42 U.S.C.§ 1983?

2. If so, what are the elements of a constitutional claim for malicious prosecution?

3. If state officials acting under color of state law initiate a civil enforcement proceeding in bad faith, without probable cause and the proceedings terminate in favor of the original defendant, can an action be brought under 42 U.S.C. § 1983 by the person wrongfully accused against the state officials responsible?

4. Is a constitutional claim stated for deprivation of liberty if a person is fired from his position by a state receiver with stigmatizing charges publicly disseminated against him, without a hearing to clear his name, and he suffers serious professional injury as a result of such actions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	6
I THE COURT SHOULD DECIDE WHETHER A CLAIM FOR CIVIL MALICIOUS PROSECUTION IS COGNIZABLE UNDER SECTION 1983	6
II THE COURT SHOULD DECIDE WHETHER A DEPRIVATION OF LIBERTY OCCURS WHEN A "STIGMA PLUS" CLAIM IS RAISED	12
CONCLUSION	14
APPENDIX A	
Opinion, United States Court of Appeals for the Second Circuit, dated October 18, 1991	1a
APPENDIX B	
Opinion, United States District Court, Southern District of New York dated July 12, 1990	15a

TABLE OF CONTENTS (Continued)

Page

APPENDIX C

Judgment, United States Court of Appeals for the Second Circuit, dated October 18, 1991 30a

APPENDIX D

Order Denying Rehearing, United States Court of Appeals for the Second Circuit, dated December 9, 1991 32a

TABLE OF AUTHORITIES

	Page
Anthony v. Baker, 767 F.2d 657 (7th Cir. 1985)	10
Baker v. McCollan, 443 U.S. 137 (1979)	7
Board of Regents v. Roth, 408 U.S. 564 (1972)	12, 13
Bell v. Brennan, 570 F. Supp. 1116 (E.D.Pa. 1983)	8
Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983)	9
Cloutier v. Epping, 714 F.2d 1184 (1st Cir. 1983)	10
Conway v. Village of Mount Kisco, 758 F.2d 46 (2d Cir. 1985), cert. granted sub nom., Cerbone v. Conway, 474 U.S. 1100 (1986)	7
DiMaggio v. O'Brien, 497 F. Supp. 870 (E.D.Pa. 1980)	9
Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985)	8
Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989)	9
Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988)	9
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	11

TABLE OF AUTHORITIES (Continued)

	Page
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	11
Ingraham v. Wright, 430 U.S. 651 (1977)	7
Janetka v. Dube, 892 F.2d 187 (2d Cir. 1989)	9
Juidice v. Vail, 430 U.S. 327 (1977)	11
Lebros v. Judges of Superior Court, Santa Clara County, 883 F.2d 810 (9th Cir. 1989)	13
Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir. 1984)	9
McMaster v. Cabinet for Human Resources, 824 F.2d 518 (6th Cir. 1987)	10
Middlesex County Ethics Committee v. Garden State Bar Association, 102 S. Ct. 2515 (1982)	11
Monroe v. Pape, 365 U.S. 167 (1961)	8
Moore v. Sims, 442 U.S. 415 (1979)	12
Neu v. Corcoran, 869 F.2d 662 (2d Cir., cert. denied, 110 S.Ct. 66 (1989)	6
Parratt v. Taylor, 451 U.S. 651 (1977)	7
Paul v. Davis, 424 U.S. 693 (1976)	4, 5,7, 12

TABLE OF AUTHORITIES (Continued)

	Page
Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980)	6
Sheppard v. Byrd, 581 F. Supp. 1374 (N.D.Ga. 1984)	8
Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988)	9
Torres v. Superintendant of the Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990)	9
Trainor v. Hernandez, 431 U.S. 434 (1977)	12
Usher v. City of Los Angeles, 828 F.2d 556 (9th Cir. 1987)	8
Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254 (5th Cir. 1984)	9
Whelehan v. County of Monroe, 558 F. Supp. 1093 (W.D.N.Y. 1983)	9
White v. Frank, 855 F.2d 956 (2d Cir. 1988)	9
Willis v. Cool, 546 F. Supp. 458 (W.D.Mo. 1982)	8
Winslow v. Romer, 759 F. Supp. 670 (D. Colo. 1991)	10
Younger v. Harris, 401 U.S. 37 (1971)	11

TABLE OF AUTHORITIES (Continued)

Page

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1,7

42 U.S.C. § 1988 7

Fed. R. Civ. P. 58(a) 4

MISCELLANEOUS

M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (2d Ed. 1991) 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Karl Easton prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, infra, 1a-14a) is reported at 947 F.2d 1011 (2d Cir. 1991). The opinion of the District Court is unreported and is reproduced in Appendix B at 15a-29a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix C at 30a) was entered on October 18, 1991. A timely petition for rehearing with a suggestion of rehearing en banc was filed on October 30, 1991. It was denied by the Court on December 9, 1991 (Appendix D at 32a). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case was brought under 42 U.S.C. § 1983. Also involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The complaint in this action, brought originally by the plaintiff pro se, contained charges of a broad campaign by various state officials, seeking publicity for themselves, to discredit and ruin Petitioner, a psychiatrist and highly acclaimed mental health specialist. Petitioner, a psychiatrist and Diplomate of

the American Board of Psychiatry, was the first Director of Psychiatry of the New York City Department of Welfare, later the Human Services Administration. (Complaint par. 18; Second Circuit Appendix, hereafter "A" at 9). In 1967, he founded a rehabilitative and residential care program for people with mental health disorders in Brooklyn, primarily for persons recently discharged from mental hospitals into the community. He then operated a not-for-profit mental health agency called Brooklyn Psychosocial Rehabilitation Institute ("BPRI")(3a).

In 1984, a patient at Boerum Hill committed suicide and the New York State Office of Mental Health ("OMH") instituted a recertification inspection of the facility. (3a)(Complaint, par. 46-49; A16). Although an inspector concluded that the quality of care at Boerum Hill was good, efforts were made by OMH to stop referrals to BPRI. (3a; A18). In response, BPRI commenced a mandamus proceeding under Article 78 of the New York Civil Practice Law and Rules against OMH, alleging that BPRI's due process rights were being violated, since no hearing had been held before the OMH action barring referrals had been taken. (24a) The State Supreme Court upheld BPRI's contention and ordered OMH to provide the hearing required by New York Mental Health Law § 31.15 before any adverse action was taken. (4a; Par. 64-65; A19; A88).

According to the complaint, the outcome of BPRI's successful state lawsuit lead OMH officials to redouble their efforts to find some pretext in the coming months to revoke its operating license. Among those urging action was Respondent Clarence Sundram, the Chairman and chief executive officer of the State of New York Commission on the Quality of Care for the Mentally Disabled ("CQC"). For personal reasons, to gain publicity for his organization and to advance his own political ends, Sundram is alleged to have commenced a vindictive and malicious campaign to remove Petitioner from the operation of BPRI and to

have the State take over its operations (par. 112-139; A27-31).

Although reports from OMH about BPRI's efforts to correct any deficiencies were positive, Sundram urged OMH in November, 1985, to revoke the operating certificates for BPRI and initiate legal action to remove Petitioner. (A27). Sundram dispatched various investigators to interview members of the staff to find out whatever they could about alleged deficiencies at BPRI, including questions about home visits, with a view to find some basis to charge Petitioner with Medicaid fraud. (A29).

It was further alleged that Sundram prepared a draft report about BPRI, which was defamatory, distorted, highly slanted and fraudulent (par. 147; A33). The draft report was sent to the state Attorney General's office and to OMH, which then decided to sever all connections with BPRI. The report made broadside allegations of medicaid fraud, rent overcharges, improper care and other ethical violations against Petitioner, all of which were later rejected in a state court hearing. Respondent Sundram actually leaked the Report to the New York Times before it was issued, where the charges against Petitioner were given maximum exposure. (par. 45; A32). The report was sent to many government agencies and widely circulated to the public. (A33). It was highly damaging to Petitioner and virtually destroyed his career as a psychiatrist. (A 34). None of the charges contained in that report were subsequently found, in later state court proceedings, to have any foundation.(5a).

In the wake of the issuance of that report, various officials took immediate action to revoke BPRI's operating license and remove Petitioner from his positions in the facility. An Order to Show Cause was sought on October 20, 1986 to set up a receivership at BPRI under the control of the State OMH. The state court signed such an order. (par. 163; A35). As a result of the new proceeding ("People v. BPRI," Index No.

29163/86, Supreme Court, Kings County), a Receiver was in fact appointed (the Federation Employment and Guidance Service, "FEGS") which immediately fired Petitioner from his position as medical director of BPRI. Thus Petitioner was severed from all connection with the programs he had initiated, under circumstances in which he was branded a cheat and a fraud, responsible for substandard care of his patients. (In fact, none of those allegations against Petitioner were later found to be true. The judicial hearing officer responsible for the BPRI litigation issued a ruling exonerating Petitioner from all the charges against him. (5a).

On March 17, 1989, Petitioner commenced this action pro se against the state officials responsible for the campaign against him, which lead to his ouster from BPRI and the bringing and dissemination of the false charges against him. Respondents thereafter moved to dismiss the action.

On July 12, 1990, Judge Sweet of the Southern District of New York issued a decision dismissing the complaint. (15a-29a). The Court found that all the defendants had Eleventh Amendment immunity for their official acts. (20a). The District Court also found that no cognizable constitutional rights of Petitioner had been violated. The Court held that Petitioner could not assert any property rights with respect to the corporate entities since the corporations had to sue on their own behalf (23a-24a). Nor did he allege any injury to any "liberty" right since all he was claiming was injury to his name which was not cognizable under Paul v. Davis, 424 U.S. 693 (1976)(26a).

Petitioner then sought a motion under Fed. R. Civ. P. 58(a) to alter or amend the judgment. While the motion to alter or amend was pending, a decision was rendered in state court exonerating Petitioner from all charges of substandard care, medicaid fraud and overcharging and ordered the entire proceedings against him dismissed. (5a). The state court specifically found that "the quality of care is in compliance with the

Regulations and guidelines" and that the care was "adequate, satisfactory and sufficient" (A373, 398). He also found that the methodology used by the inspectors from CQC was "not actual or accurate." (A396). He also found that there was no "misappropriation of rents" by Petitioner or members of his family. (A401) He concluded that there was no basis for charging Petitioner with MEDICAID fraud. (A398). Nevertheless, the District Court adhered to its original judgment dismissing the complaint.

On appeal to the Second Circuit, the Court of Appeals affirmed the order of dismissal. It focused on three constitutional causes of action alleged in the complaint: (1) First Amendment retaliation; (2) loss of liberty; and (3) malicious prosecution.

On the First Amendment claim, the court found that Petitioner had properly alleged that his actions in commencing the state court litigation (to prevent loss of state referrals without a hearing) was protected by the First Amendment. Therefore, any adverse state action taken in retaliation for that conduct would be unconstitutional. However, the court noted that the original state court action was commenced by BPRI, the agency, and not by Petitioner personally. The federal complaint, however, alleges a campaign by state officials against Petitioner in his personal capacity. Therefore Petitioner's claim must fail "because he himself has not engaged in conduct deserving of First Amendment protection, and therefore any alleged retaliation against him could not have been in violation of his First Amendment rights." (8a).

On the loss of liberty claim, the Court noted that this Court's decision in Paul v. Davis, 424 U.S. 693 (1976), had established that loss of reputation by reason of state action does not by itself amount to a Constitutional deprivation. Thereafter, various decisions in the Second Circuit had examined the question of whether the additional loss of a more tangible interest, together with damage to reputation, might amount to a

sufficient constitutional injury to invoke Section 1983 liability. The Court had labeled this principle "stigma plus." See Neu v. Corcoran, 869 F.2d 662 (2d Cir., cert. denied, 110 S.Ct. 66 (1989) and Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980). However, the Court of Appeals rejected Petitioner's argument that since had been fired by a Court appointed Receiver (a state actor for purposes of Section 1983), the dismissal and damage to reputation together amounted to "stigma plus," thus invoking the exception to Paul v. Davis. It also noted as an alternative, that even if a valid cause of action was stated, the Respondents would be entitled to qualified immunity.

On the malicious prosecution claim, the Court noted that a Section 1983 claim may be made out by allegations of malicious prosecution by state officials. The elements of the constitutional tort track the claim of malicious prosecution under state law. But the Court noted that all the prior cases on this issue occurred in a criminal context. However, here the "prosecution" at issue was of a civil nature, i.e, the effort by the state officials to seize BPRI, appoint a Receiver and remove Petitioner from the agency. The court rejected any recognition of a constitutional claim for "malicious civil prosecution." (13a-14a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD DECIDE WHETHER A CLAIM FOR CIVIL MALICIOUS PROSECUTION IS COGNIZABLE UNDER SECTION 1983

This Court has not examined the issue of whether a constitutional claim exists for malicious prosecution (and therefore is enforceable under Section 1983), nor has it determined what the contours of such a right would be. This Court originally granted certiorari in a

case that might have examined that issue, see Conway v. Village of Mount Kisco, 758 F.2d 46 (2d Cir. 1985), cert. granted sub nom., Cerbone v. Conway, 474 U.S. 1100 (1986), writ dismissed sub nom. Cerbone v. Conway, as improvidently granted, 479 U.S. 84 (1986).

In that case, the petitioner had brought a claim in federal court for malicious prosecution under Section 1983, after she had been arrested on what she alleged were totally unfounded charges of passing a bad check. The Second Circuit held that such a claim is cognizable under Section 1983 since the Fifth and Fourteenth Amendments do encompass the right not to be unfairly prosecuted by state and local authorities. Such actions if proven would constitute a deprivation of "liberty" under the due process clause. The Second Circuit otherwise upheld the validity of the complaint.

The Defendants in that case then sought a writ of certiorari in this Court, raising the following questions:

> Questions presented: (1) In a claim under 42 USC §1983 for malicious prosecution, did court below err in holding that 42 USC §1988 incorporates as § 1983 claim state's common law of malicious prosecution, without identifying right, privilege, or immunity secured by Constitution and laws, contrary to Baker v. McCollan, 443 U.S. 137 (1979)? (2) Did court below err in holding that malicious prosecution claim is of constitutional magnitude because it alleges "great humiliation, ridicule, and mental anguish" and arrest under warrant that court elsewhere held time-barred, contrary to Paul v. Davis, 424 U.S. 693 (1976)? (3) If interest in freedom from unjustified litigation protected by common law malicious prosecution is either "liberty" or "property" under Fourteenth Amendment, does complaint state claim under Due Process Clause in light of Hudson v. Palmer, 35 CrL 3230 (1984), Parratt v. Taylor, 451 U.S. 651 (1977), and Ingraham v. Wright, 430 U.S. 651

> (1977), since acts complained of were random, unauthorized, and tortious under state law, which provides adequate and parallel tort remedy? (4) When court below rejected application of Parratt, Hudson, and Ingraham to § 1983 malicious prosecution due process complaint, did it misconstrue Monroe v. Pape, 365 U.S. 167 (1961)?

See 38 CrL 4159 (January 27, 1986).

This Court granted certiorari on these four questions, 474 U.S. 1100 (1986). After oral argument was held on the case, the writ was dismissed as improvidently granted, 479 U.S. 84 (1986).

In the meantime, the lower federal courts have examined the issue of malicious prosecution in a variety of contexts and have come to diametrically different conclusions as to the viability of a constitutional claim for malicious prosecution and the exact scope of such a claim.

A number of courts have held that Section 1983 does not encompass such a claim under any circumstances. See Willis v. Cool, 546 F.Supp. 458 (W.D.Mo. 1982) (malicious prosecution claim against police not state Section 1983 cause of action); Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985)(malicious prosecution claim not covered under Section 1983 since no constitutional violation); Bell v. Brennan, 570 F.Supp. 1116 (E.D.Pa. 1983)(same).

Other courts have held that additional injury or deprivation is necessary before such a claim could be brought under Section 1983. See Sheppard v. Byrd, 581 F.Supp. 1374 (N.D.Ga. 1984)(malicious prosecution claim involving loss of livelihood does implicate constitutional claim); see also Usher v. City of Los Angeles, 828 F.2d 556 (9th Cir. 1987)(racially derogatory remarks by police to plaintiff demonstrate racial animus and equal protection violation in malicious prosecution);

Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983)(malicious prosecution action brought by state against lawyer implicates First Amendment right of petition).

Most of the lower federal courts have held, as did the Second Circuit in this case, that the elements of a common law malicious prosecution cause of action carried over to Section 1983 cases, see Janetka v. Dube, 892 F.2d 187 (2d Cir. 1989) and White v. Frank, 855 F.2d 956 (2d Cir. 1988)(elements of claim include (1) person instituted criminal charges against another party; (2) with malice; (3) without probable cause; (4) the proceedings terminated in his favor); see also Goodwin v. Metts, 885 F. 2d 157 (4th Cir. 1989) (continuation of criminal proceedings after evidence developed to show plaintiff innocent of crime established constitutional malicious prosecution case; policeman who supplied false information liable); Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254 (5th Cir. 1984)(if state prosecutors brings charges without probable cause, such malicious prosecution is violation of due process); Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir. 1984) (same); Whelehan v. County of Monroe, 558 F.Supp. 1093 (W.D.N.Y. 1983)(malicious prosecution claim against prosecutor states valid cause of action but prosecutor may have absolute immunity); DiMaggio v. O'Brien, 497 F.Supp. 870 (E.D.Pa. 1980)(abuse of process and malicious prosecution can be basis for Section 1983 claim); Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988) (law enforcement officer violates constitutional rights by engaging in bad faith, malicious prosecution); Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988)(malicious prosecution claim cognizable under Section 1983; Fifth Amendment violation).

Other courts have required something more than a mirror image of common law malicious prosecution, see Torres v. Superintendant of the Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990)(to state malicious prosecution action under Section 1983, plaintiff must allege elements of common-law malicious prosecution

claim and must also allege egregious misuse of legal proceedings arising to constitutional dimensions). Other courts require the total absence of any basis for the underlying prosecution before a Section 1983 claim can be brought, see Anthony v. Baker, 767 F.2d 657 (7th Cir. 1985); Winslow v. Romer, 759 F. Supp. 670 (D. Colo. 1991)(same).

The Second Circuit here noted that the issue of whether Section 1983 extends to claims of civil malicious prosecution has yet to be determined: "we have never determined whether a state law tort for civil as opposed to criminal malicious prosecution gives rise to a cause of action under § 1983. All of our previous cases that have reached the question have examined claims of malicious prosecution premised on underlying criminal proceedings." (12a). The Court added:

> To our knowledge, no other court to have considered the question has held that a cause of action pursuant to § 1983 for malicious civil prosecution exists. See McMaster v. Cabinet for Human Resources, 824 F.2d 518, 522 (6th Cir. 1987)(those "courts that have recognized that malicious prosecution may support a section 1983 claim are virtually unanimous in holding that constitutional protection exists only with respect to criminal proceedings and not to civil proceedings")(citations omitted); M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (2d Ed. 1991) § 3.10, at 169 & n.366 (those few courts to have considered the question have concluded that malicious civil prosecution does not give rise to cause of action under § 1983)(citing cases); Cloutier v. Epping, 714 F.2d 1184 (1st Cir. 1983)(in civil context, malicious prosecution standing alone does not implicate federally protected rights). (12a)

However, the Second Circuit did not properly frame the issue. In this case, state authorities brought a civil enforcement action that had an enormous negative

effect upon the professional life of Petitioner: they took over the agency which he created and helped to operate and removed him from his position. In the process they defamed him and destroyed his professional reputation.

The impact on his life of these acts was at least as great as if he had been arrested and falsely charged by state criminal authorities. Ultimately a state court exonerated him from all charges levied against him. If the other elements of a malicious prosecution claim are made out, i.e. (1) a state officer instituted charges against a party; (2) with malice; (3) without probable cause; (4) the proceedings terminated in favor of the accused person, the fact that the proceedings instituted by state officials were civil enforcement actions rather than criminal proceedings should not alter the fact that a serious deprivation of liberty occurred without due process of law.

In other areas, this Court has accepted the analogy that state civil enforcement proceedings are the functional equivalent of criminal proceedings. Under the doctrine of Younger v. Harris, 401 U.S. 37 (1971), for example, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims could have been or could be presented in ongoing state judicial proceedings that concern important state interests," Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 237-38 (1984).

This Court has held that federal courts should not enjoin or interfere with not only on-going state criminal or quasi-criminal proceedings but also civil enforcement actions as well. The doctrine applies to a wide variety of civil proceedings, including nuisance actions, forfeiture proceedings, and other civil enforcement and professional discipline areas. See Juidice v. Vail, 430 U.S. 327 (1977)(Younger applies to civil contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (challenge to state law when on-going nuisance proceeding pending; Younger applies); Middlesex County Ethics Committee v. Garden State Bar Assoc.,

102 S.Ct. 2515 (1982)(Younger applies to lawyer discipline proceeding); Moore v. Sims, 442 U.S. 415 (1979)(custody proceedings to recover custody of abused children; Younger applies); Trainor v. Hernandez, 431 U.S. 434 (1977) (attachment proceedings to recover welfare payments secured by fraud).

If this Court has held that civil enforcement actions are so close to criminal proceedings to require the abstention doctrine of Younger to apply to them, it would appear that the symmetry between the two types of proceedings should apply here as well and a Section 1983 action for civil malicious prosecution should be recognized.

In any event, this Court should grant certiorari in this case to examine and elucidate the standards for malicious prosecution as a constitutional tort, a examination that was previously deemed appropriate but later aborted in the Conway case cited above.

II.

THE COURT SHOULD DECIDE WHETHER A DEPRIVATION OF LIBERTY OCCURS WHEN A "STIGMA PLUS" CLAIM IS RAISED

The other major legal issue raised by the case is the question of the scope of Paul v. Davis, 424 U.S. 693 (1976) and the "stigma plus" doctrine. Despite the holding in Paul that damage to reputation alone does not implicate any constitutional rights, this Court had previously held that the right to "liberty" under the due process clause also includes right to protect one's reputation under certain specified circumstances, such as when public employees are fired with stigmatizing charges made in public about them, and they were never given a chance to disprove charges, thus interfering with such employees' right to get another job, see Bd. of Regents v. Roth, 408 U.S. 564 (1972). Thus the due

process clause requires that the state afford employees a hearing or other opportunity to "clear [their] name," if they are fired with stigmatizing charges being disseminated in that manner.

In this case precisely that situation arose. Petitioner was removed from his position at BPRI with serious stigmatizing charges publicly disseminated about him and he had no chance to clear his name. The removal was accomplished by a state appointed receiver, who must be considered a state actor. See Lebros v. Judges of Superior Court, Santa Clara County, 883 F.2d 810, 818, n. 10 (9th Cir. 1989) 1989)("Because Nunn was acting in his capacity as court-appointed receiver, he was acting under color of state law;" allegations that receiver confiscated plaintiff's mail and disrupted financial transactions stated valid section 1983 action).

On the face of the matter, Petitioner therefore stated a valid cause of action under the Board of Regents v. Roth rationale. He was alleging more then merely a damage to his reputation. The Court below gave too narrow a reading to the rights alleged to have been violated.

Furthermore, the rights established under the Roth rationale were clearly established since 1972. There can be no basis for applying any qualified immunity defense, the alternate holding in this case.

CONCLUSION

This court should grant the writ to decide whether a claim for malicious prosecution, and in particular for civil malicious prosecution is cognizable under Section 1983 and whether a claim relating to dismissal of a professional by a state appointed receiver invokes the "stigma plus" doctrine of Bd. of Regents v. Roth, 408 U.S. 564 (1972).

Dated: March 6, 1992

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1581 - August Term 1990

(Argued May 30, 1991, Decided October 18, 1991)

Docket No. 91-7165

KARL EASTON, M.D.,

Plaintiff-Appellant,

-v.-

CLARENCE J. SUNDRAM; PAUL STAVIS; WALTER J. SAURACK; JOHN J. RYBALTOWSKI; BRUCE E. FEIG; FRANCINE COURNOS; PAUL GLICKMAN; LOUIS J. PATACK; KATHLEEN SWEENEY and ILENE MARGOLIN,

Defendants-Appellees.

Before:

OAKES, Chief Judge,
KAUFMAN and WALKER, Circuit Judges.

Appeal from a judgment entered on July 18, 1990 pursuant to an opinion and order of the United States

District Court for the Southern District of New York (Robert W. Sweet, Judge) granting defendants' motion to dismiss the complaint for failure of pleading under Fed.R.Civ. P. 12(b)(6).

Judgment affirmed.

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New York, New York,
for plaintiff-appellant.

LAUREL W. EISNER, Esq.,
Assistant Attorney General of the
State of New York,
New York, New York,
(Robert Abrams, Attorney
General of the State of New York,
of counsel), for defendants-
appellees.

WALKER, Circuit Judge:

Dr. Karl Easton appeals from a judgment entered on July 18, 1990 pursuant to an opinion and order of the United States District Court for the Southern District of New York (Robert W. Sweet, Judge) granting defendants' motion to dismiss the complaint for failure of pleading under Fed.R.Civ.P. 12(b)(6). Easton, now represented by counsel, contends that the district court overlooked three well-pleaded constitutional claims under 42 U.S.C. § 1983 in his pro se complaint: claims for first amendment retaliation, malicious prosecution, and a violation of a protected liberty right. He further contends that the district court erred in holding that certain of the defendants were entitled to prosecutorial and witness immunity. We find that Easton's complaint failed to state a claim on the first amendment retaliation

and malicious prosecution causes of action and that defendants were entitled to qualified immunity on the violation of liberty cause of action, regardless of whether or not Easton stated a claim. We therefore affirm without reaching the issues of prosecutorial or witness immunity.

BACKGROUND

For the purposes of review of a Rule 12(b)(6) dismissal, we take the factual allegations of plaintiff's complaint as true. Easton, a psychiatrist, was the former executive director and ex officio board member of the Brooklyn Psychosocial Rehabilitation Institute ("BPRI"), a not-for-profit mental health institution. His claims arise from a series of events that started with the suicide of a patient in July of 1984. The New York State Office of Mental Health ("OMH") subsequently initiated an inspection and ongoing investigation of Easton's facilities.

On August 24, 1984, OMH Regional Director Sarah Connell wrote a letter to BPRI'S executive director, Irving Link, detailing a list of alleged shortcomings that had been uncovered in various inspections. These allegations included: lack of proper record-keeping and documentation of patient progress, failure to provide for regular medical and dental care, failure to properly report suicides, failure to document the implementation of a suicide prevention program, the presence of a serious roach infestation in patients' bedrooms, the possession by patients of outdated medications, improperly executed patient fee agreements, inadequate inventories of patients' possessions, and overcrowding.

On December 24, 1984, the New York City regional director of OMH suspended patient referrals to Boerum Hill, BPRI's residential and rehabilitative care facility in Brooklyn. In response, on February 5, 1985, BPRI filed a petition against OMH under Article 78 of the New York State Civil Practice Law and Rules (CPLR) in state court, alleging that its due process rights were

being violated since no hearing had been held before OMH blocked referrals. The Article 78 suit was concluded on April 17, 1985, with OMH ordered to afford a hearing within 30 days. The hearing was never held, but on May 30, 1985, the regional office of OMH rescinded its memorandum to stop referrals to BPRI. The investigation by OMH continued, with health and fiscal standards targeted for scrutiny.

At about the same time that BPRI brought its Article 78 suit against OMH, another state agency, the Commission on Quality of Care ("CQC"), started an investigation of BPRI at the request of Kathleen Sweeney, a supervisor in the OMH regional office. In October of 1986, CQC issued a report recommending the continuation "under new auspices" of BPRI programs, recovery of cash and other assets "unlawfully received" by Easton's family or closely held corporations, and criminal prosecution of those who had "engaged in systematic fraud against the State and Federal governments."

The New York State Attorney General, the OMH and the State Department of Social Services ("DSS") brought suit against BPRI, Easton and others under the caption People of the State of New York. New York State Office of Mental Health. New York State Department of Social Services v. Brooklyn Psychosocial Rehabilitation Institute, 3 Lafayette Avenue Corporation, Cobble Hill Center Corporation, Dr. Karl Easton, Jacqualine Easton, Irving Link, Theodore Rosten, Sup. Ct. Kings County, Index No. 29163/86 ("People v. BPRI"). In People v. BPRI, the state charged the defendants with Medicaid fraud, endangering the health and safety of mentally disabled clients, and siphoning public funds through BPRI to members of Easton's family by way of improper leases with real estate corporations owned by Easton's children. At the same time, in an ex parte proceeding brought by the Attorney General pursuant to Article 31, Section 28 of the New York State Mental Health Law ("MHL"), the Supreme Court of the State of New York

appointed Federation Employment Guidance Service ("FEGS"), a not-for-profit social welfare agency, as temporary receiver of the BPRI facilities pending determination of the State's charges. The receiver removed Easton from his post at BPRI. The complaint alleges that this firing took place in conjunction with the dissemination of highly defamatory charges against Easton. The court continued the receivership after a hearing, and it remained in effect for eighteen months, until April of 1988. When the receivership terminated, OMH acquired the properties under the New York State Eminent Domain Procedure Law.

The State Supreme Court referred People v. BPRI to Judicial Hearing Officer ("JHO") Carmine A. Ventiera for determination of all issues. On November 7, 1990, the JHO denied the State relief on all causes of action. Easton alleges that the investigation and all of the charges that stemmed from it were fraudulently concocted and presented in bad faith. On March 17, 1989, before the JHO had issued any decision, Easton and three corporate plaintiffs commenced this action pro se in the Southern District of New York, naming seven defendants: Clarence Sundram, Chairman and Commissioner of the CQC; Paul Stavis, Counsel to CQC; Walter E. Saurack, Chief of the Fiscal Bureau of CQC; John J. Rybaltowski, Program Cost Analyst of CQC; Bruce E. Feig, Executive Deputy Commissioner of OMH; Francine Cournos, M.D., Psychiatric Consultant, OMH; and Paul Glickman, former Assistant Attorney General of the State of New York. On May 3, 1989, the corporate plaintiffs were ordered dismissed for lack of counsel. On September 7, 1989, Easton filed an amended complaint naming three additional defendants: Louis J. Patack, Assistant Counsel, OMH; Kathleen Sweeney, Standards Compliance Analyst, OMH; and Ilene Margolin, former Special Assistant to the Governor of the State of New York. On November 20, 1989, Easton filed a second amended complaint, seeking $40 million in compensatory and exemplary damages.

The second amended complaint charged the defendants in their individual and official capacities with violating the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1981, 1983, 1985 and 1988, and 18 U.S.C. §§ 1962(c) and (d). The complaint set forth eight causes of action, including violation of Easton's civil rights; negligence, gross negligence, recklessness and misrepresentation; defamation, deceit and intentional infliction of emotional distress; abuse of process and malicious prosecution; wrongful receivership and wrongful condemnation; wrongful dismissal; racketeering and conspiracy to defraud under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). It charged that the individual defendants secretly conspired to deprive him of his constitutionally protected rights in investigating and prosecuting the State's claims in People v. BPRI.

The defendants moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56(b). On July 18, 1990, the district court granted the motion to dismiss, holding that all defendants were immune from suit in their official capacities under the Eleventh Amendment, and that Easton had failed to plead cognizable federal claims against the defendants in their individual capacities. It also held that Glickman was entitled to absolute prosecutorial immunity and that Sweeney, Cournos and Patack were entitled to witness immunity. The court dismissed Easton's conspiracy claims for failure to state a claim, his RICO claim for failure to allege the necessary predicate offenses and the Section 1983 claim for failure to allege the deprivation of a protected property or liberty interest. Finally, the district court declined to retain jurisdiction over common law tort claims. On December 18, 1990, it granted plaintiff's motion for reconsideration and reaffirmed the dismissal of the complaint. It denied plaintiff's second motion for reargument on January 14 1991. Appeal to this court followed.

DISCUSSION

Easton argues that the district court overlooked three well pleaded constitutional claims in his complaint: claims for first amendment retaliation, malicious prosecution, and a violation of a protected liberty right.

In reviewing Easton's appeal from the dismissal of his pro se complaint, we must bear in mind that in ruling on a 12(b)(6) motion, a court is required to accept the material facts alleged in the complaint as true, see. e.g., Cooper v. Pate, 378 U.S. 546 (1964)(per curiam), and not to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991). This caution against dismissal applies with even greater force where the complaint is pro se, see. e.g., id.; Haines v. Kerner, 404 U.S. 519, 520-21 (1972), or where the plaintiff complains of a civil rights violation, see, e.g., Branum, 927 F.2d at 705.

I. First Amendment Retaliation

Easton's complaint alleges that the defendants waged a bad faith campaign against him, motivated, at least in part, out of a desire to retaliate for his decision to bring the Article 78 proceeding in state court against OMH on behalf of BPRI. Easton's complaint states inter alia: "After losing a law suit, [the defendants] implemented a plan to remove and punish the plaintiff. . . ." He asserts that the right to redress grievances is protected by the first amendment, and that he has alleged a well-pleaded complaint for first amendment retaliation under 42 U.S.C. § 1983. "To recover on a first amendment claim under § 1983, a plaintiff must demonstrate that his conduct is deserving of first amendment protection and that the defendants' conduct of harassment was motivated by or substantially caused by his exercise of free speech." Rattner v. Netburn, 930

F.2d 204, 208 (2d Cir. 1991)(quoting Donahue v. Windsor Locks Bd. of Fire Com'rs, 834 F.2d 54, 58 (2d Cir. 1987)); see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287(1977). Easton's complaint fails to meet the first requirement of this test because he has failed to demonstrate that his conduct is deserving of first amendment protection. Although we accept his argument that the institution of an Article 78 lawsuit may constitute first amendment protected activity, see, e.g., Bill Johnson's Restaurants Inc. v. NLRB, 461 U.S. 731, 741 (1983)("the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"); Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988)(first and fourteenth Amendments guarantee right to petition government for broad redress of grievances), it was BPRI, not Easton, that brought the Article 78 proceeding. Therefore, accepting as true Easton's allegations that defendants sought to retaliate because OMH was unsuccessful in the Article 78 proceeding, BPRI's first amendment rights were implicated, not Easton's. Cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)(corporation may assert its own first amendment rights). Easton's claim thus fails at the outset because he himself has not engaged in conduct deserving of first amendment protection, and therefore any alleged retaliation against him could not have been in violation of his first amendment rights.

II. Deprivation of Liberty

Easton contends that his complaint stated a claim for deprivation of a constitutionally protected liberty interest when he alleged that he was fired from his job and defamed in a way that will interfere with future job possibilities. We need not decide the issue of whether or not Easton adequately alleged deprivation of a liberty interest, however, because we hold that in any event, the defendants were entitled to qualified immunity on this claim since none of our decisions had clearly established at the time of the alleged conduct that the defendants' actions constituted a deprivation of a protected liberty

interest. In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court established that government officials are immune from liability for alleged constitutional violations if the claims do not allege violations of law which were "clearly established at the time an action occurred." The qualified immunity doctrine therefore protects a government official performing discretionary functions from liability to the extent that his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. (citations omitted). Typically when the district court has not decided a qualified immunity question, our practice is to remand. However, where the determination may be made on the purely legal basis that a law was not "clearly established at the time an action occurred," as here, we believe that resort to the district court is unnecessary. See Robison v. Via, 821 F.2d 913, 920-21 (2d Cir. 1987) (qualified immunity can be either a pure question of law, as where rights have not yet been declared, or question of fact requiring resolution of objective reasonableness of state actor).

In reviewing our decisions, we find that the law of this Circuit has not clearly established that the conduct Easton complains of rises to the level of a constitutional violation, rather than simply a state tort. In Paul v. Davis, 424 U.S. 693, 701 (1976), the Supreme Court held that "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Accord Siegert v. Gilley, 111 S.Ct. 1789 (1990). Our cases have interpreted Paul to mean that some "stigma plus" is required to establish a constitutional deprivation. Neu v. Corcoran, 869 F.2d 662 (2d Cir.), cert. denied, 110 S.Ct. 66 (1989). In Neu, we held that our cases have not "clearly established that defamation occurring other than in the course of dismissal from a government job or termination of some other legal right o[r] status will suffice to constitute a deprivation of a liberty interest." Id. at 667.

Easton asserts that this case is analogous to our holding in Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980). In Quinn, the plaintiff was an official of a not-for profit corporation created to carry out urban redevelopment in Syracuse. He alleged that the Mayor of Syracuse defamed him and mounted a campaign to have him fired. We held that Quinn's allegations were sufficient to survive summary judgment, noting it was clear that the defamation occurred in the course of the termination of employment. However, re-examining Quinn in Neu v. Corcoran, 869 F.2d at 668-69, we reasoned that Quinn's job may have been "at least quasi-governmental, since his original appointment had come at the behest of the Mayor. ... and the employing corporation had received the vast majority of its funding from the . . . government. . . ." We therefore concluded that Quinn did not "squarely establish[] that governmental defamation, outside the context of discharge from governmental employment or similar termination of a legal right or status, can constitute a deprivation of a liberty interest." Id. at 669. Thus, since Easton has failed to allege that he was defamed in the course of being fired from governmental employment or coupled with the termination of a legal right or status, we do not find Quinn to be of any assistance to him.

Neu also foreclosed Easton's argument based on Rudow v. City of New York, 822 F.2d 324 (2d Cir 1987), that a loss of private employment coupled with a foreclosure of other employment opportunities is sufficient to state a constitutional claim. Indeed, in Neu we stated that although Rudow "arguably suggests that the plaintiff would have a sufficient claim if he had alleged that the stigma foreclosed him from practicing his profession, even though the defamation was not connected to any loss of government employment or legal status, ... we decline to read ... Rudow that broadly." Neu at 668.

We further reject Easton's strained argument that because he was ultimately dismissed from his job at

BPRI by a state court appointed receiver, he was discharged by a state actor and therefore has suffered a loss cognizable under our holding in New. Even if we were to accept his argument that the receiver who fired him was a state actor for purposes of § 1983, that does not mean that Easton was "discharge[d] from governmental employment," Id. at 669 (emphasis added), only that a state actor terminated his private employment. Nor does Easton point to any other "legal right or status" that he was deprived of by virtue of the alleged firing and dissemination of defamatory statements. We therefore affirm the district court's dismissal of Easton's claim on the alternate ground that even if Easton had stated a claim for deprivation of a constitutionally protected liberty interest, a question we do not decide, the defendants were nonetheless entitled to qualified immunity because it was not clearly established that the defamation Easton alleges constituted a deprivation of a constitutionally protected liberty interest.

III. Malicious Prosecution

Easton's final contention is that he stated a constitutional claim for malicious prosecution. The district court initially rejected this claim because at the time it rendered its decision, the state court proceedings had not yet terminated in Easton's favor. When those proceedings did terminate, Easton sent a letter to the district court. Interpreting the letter as a motion for reargument, the district court denied the motion on the merits.

Although we have repeatedly held that to state a claim for malicious prosecution under § 1983, a federal plaintiff must prove the elements of malicious prosecution under state law, see, e.g., Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027 (1986), we have never determined whether a state law tort for civil as opposed to criminal malicious prosecution gives rise to a cause of action under § 1983. All of our previous

cases that have reached the question have examined claims of malicious prosecution premised on underlying criminal proceedings. See, e.g., Posr v. Doherty, No. 90-7914 (2d Cir. Sept. 10, 1991); Day v. Morgenthau, 909 F.2d 75 (2d Cir. 1990); Conway v. Village of Mount Kisco, N.Y., 750 F.2d 205 (2d Cir. 1985), reaff'd, 758 F.2d 46 (2d Cir. 1985), cert. granted sub nom. Cerbone v. Conway, 474 U.S. 1100, cert. dismissed, 479 U.S. 84 (1986). To our knowledge, no other court to have considered the question has held that a cause of action pursuant to § 1983 for malicious civil prosecution exists. See McMaster v. Cabinet for Human Resources, 824 F.2d 518, 522 (6th Cir. 1987)(those "courts that have recognized that malicious prosecution may support a section 1983 claim are virtually unanimous in holding that constitutional protection exists only with respect to criminal proceedings and not to civil proceedings")(citations omitted); M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (2d Ed. 1991) § 3.10, at 169 & n.366 (those few courts to have considered the question have concluded that malicious civil prosecution does not give rise to cause of action under § 1983)(citing cases); Cloutier v. Epping, 714 F.2d 1184 (1st Cir. 1983)(in civil context, malicious prosecution standing alone does not implicate federally protected rights).

Simply because New York state affords a tort of civil malicious prosecution does not transform Easton's claim into a constitutional cause of action. Although we have previously held that the state tort of malicious criminal prosecution gives rise to a cause of action under § 1983, we note that criminal malicious prosecution typically implicates constitutional rights secured by the fourteenth amendment, such as deprivation of liberty, that are not automatically implicated in a malicious civil suit. This case, therefore, requires us to examine more closely the constitutional underpinnings of a § 1983 claim for malicious prosecution, bearing in mind that court must not "'make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Parratt v.

Taylor, 451 U.S. 527, 544 (1981)(quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

The fourteenth amendment protects those specific rights, guaranteed by the Bill of Rights, which are required for ordered liberty, Palko v. Connecticut, 302 U.S. 319 (1937), and guards more generally against official conduct which "shocks the conscience" Rochin v. California, 342 U.S. 165, 209 (1952) or is "'used for purposes of oppression.'" Daniels v. Williams, 474 U.S. 327, 331 (1986)(quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)); see McClary v. O'Hare, 786 F.2d 83, 88-89 (2d Cir. 1986).1 As the First Circuit recently explained in a malicious prosecution case, where a "plaintiff has not been physically abused, detained, prosecuted due to racial or political motivation or otherwise deprived of equal protection of the law, courts are reluctant to find 'conscience-shocking' conduct that would implicate a constitutional violation." Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404, 410 (1st Cir. 1990)(citing cases). A civil regulatory action, even if broad-based and aggressive, does not involve the deprivation of personal liberty or invasion of privacy that attends a criminal prosecution. See Jones v. Chicago, 856 F.2d 985, 992 (7th Cir. 1988)(questioning whether criminal malicious prosecution can ever count as a deprivation of liberty where defendant is not imprisoned). Furthermore, Easton has not alleged that he was subjected to "conscience-shocking" behavior that would transform his state cause of action into a constitutional one. We do not hold that civil malicious prosecution can never give rise to a cause of action under § 1983, although we suspect it normally will not. Our focus is on the circumstances of this case, where we do not find that Easton was subjected to a misuse of the legal process so egregious as to work a deprivation of a

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1 We do not understand Easton to be making a claim for a violation of procedural as opposed to substantive due process.

constitutional dimension. Accordingly, we decline Easton's invitation to extend § 1983 to his allegations of malicious civil prosecution.2

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

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2 It is possible to construe Easton's claim for first amendment retaliation as a claim for malicious prosecution; we consider that separately above.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 1839 (RWS)

KARL EASTON, M.D.,

Plaintiff,

- against -

CLARENCE J. SUNDRAM, PAUL STAVIS, WALTER J. SAURACK, JOHN J. RYBALTOWSKI, BRUCE E. FEIG, FRANCINE COURNOS, PAUL GLICKMAN, LOUIS J. PATACK, KATHLEEN SWEENEY, and ILENE MARGOLIN,

Defendants.

OPINION

APPEARANCES:

KARL EASTON, M.D.
Plaintiff Pro Se
535 Park Avenue
New York, New York 10021

HON. ROBERT ABRAMS
Attorney General of the State
of New York
120 Broadway
New York, New York 10271
By: JUDITH T. KRAMER, ESQ.
LAUREL W. EISNER, ESQ.
Assistant Attorneys General
Of Counsel

Defendants Clarence J. Sundram, Paul Stavis, Walter E. Saurack, John J. Rybaltowski, Bruce E. Feig, Francine Cournos, Paul Glickman, Louis J. Patack, Kathleen Sweeney, and Ilene Margolin, have moved to dismiss the Second Amended Complaint (the "Complaint") of plaintiff pro se Karl Easton, M.D. ("Easton") pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., or, in the alternative, for summary judgment in their favor pursuant to Rule 56(b), Fed.R.Civ.P. The motion to dismiss is granted and the complaint dismissed for the reasons set forth below.

The Parties

Easton is former executive director and ex-officio board member of The Brooklyn Psychosocial Rehabilitation Institute ("BPRI"), and medical director of one of its mental hygiene facilities, the Lafayette Center. Easton is also the president of various real estate corporations owned by his children which have leased property to the mental hygiene facilities. The ten defendants and their affiliations are as follows: Clarence Sundram, Chairman and Commissioner of the State of New York Commission on the Quality of Care for the Mentally Disabled ("CQC"); Paul Stavis, Counsel to CQC; Walter E. Saurack, Chief of the Fiscal Bureau of CQC' John J. Rybaltowski, Program Cost Analyst, CQC' Bruce E. Feig, Executive Deputy Commissioner of the New York State Office of Mental Health ("OMH"); Louis J. Patack, Assistant Counsel, OMH' Francine Cournos, M.D., Psychiatric Consultant, OMH' Kathleen Sweeney, Standards Compliance Analyst, OMH; Ilene Margolin, former Special Assistant to the Governor and Paul Glickman, former Assistant Attorney General of the State of New York.

The Complaint

Easton seeks $40,000,00 in compensatory and exemplary damages from the defendants, all of whom are, or were, employees of various New York

State government agencies, namely the Governor's Office, and the Office of the Attorney General for the Mentally Disables ("AGMD"). Easton charges the defendants in their individual and official capacities with violating the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1981, 1983, 1985, and 1988, and 18 U.S.C. §§ 1962(c) and (d).3 He alleges that the individual defendants, who are the investigators, psychiatrists, mental health professionals, administrators and lawyers that investigated, prosecuted and testified against him and his co-defendants in a certain State court proceeding (identified in further detail below) each participated in a secret conspiracy to deprive him of his constitutionally protected rights. He also alleges the conspiracy involved a violation of RICO, the federal anti-racketeering statue, 18 U.S.C. 1961 et seq., plus a long list of common law torts.

Prior Proceedings

Easton and three corporate plaintiffs filed the original complaint on March 17, 1989, naming seven of the defendants: Sundram, Stavis, Saurack, Rybaltowski, Feig, Cournos and Glickman. By order of May 3, 1989, the corporate plaintiffs were dismissed for lack of counsel and on September 7, 1989 Easton filed an amended complaint in which he named three

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3 The Complaint sets forth eight causes of action: violation of his civil rights (First Claim for Relief, 107-229); negligence, gross negligence, recklessness and misrepresentation (Second Claim for Relief, 230-239); defamation, deceit and intentional infliction of emotional distress (Third Claim for Relief, 241-246); abuse of process and malicious prosecution (Fourth Claim for Relief, 247-250); wrongful receivership and wrongful condemnation (Fifth Claim for Relief, 251-260); wrongful dismissal (Sixth Claim for Relief, Racketeer Influenced and Corrupt Organizations Act ("RICO")(Eighth Claim for Relief, 266-310).

additional defendants Patack, Sweeney and Margolin. On November 20, 1989 Easton filed a second amended complaint, described above, which the defendants move to dismiss.

As noted, Easton's claims arise out of an enforcement proceeding brought under Article 31 of the New York State Mental Hygiene Law ("MHL") and New York State Executive Law § 63(12) in October 1986 by the New York State Attorney General's Office, on behalf the People of the State of New York and two State agencies, against Easton and several other individual and corporate defendants. That action, which is now pending in New York Supreme Court, is People of the State of New York, New York State Office of Mental Health, New York State Department of Social Services v. Brooklyn Psychosocial Rehabilitation Institute, 3 Lafayette Avenue Corporation, Cobble Hill Center Corporation, Dr. Karl Easton, Jacqualine Easton, Irving Link, Theodore Rosten, Sup. Ct. Kings County, Index No. 29163/86 ("People v. BPRI"). In People v. BPRI the defendants are charged with violations in connection with the operation of three mental hygiene facilities, including endangering the health and safety of mentally disabled clients, Medicaid fraud, and siphoning public funds through BPRI to members of the Easton family through improper leases with real estate corporations owned by Easton's children. People v. BPRI was filed by the Attorney General, the OMH and the State Department of Social Services ("DSS").4

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4 OMH is the State agency mandated by law to develop and foster programs for the care, treatment, rehabilitation, education and training of the mentally disabled. OMH is responsible for establishing standards and supervising facilities which receive Medicaid funding. Social Services Law §§ 364, 364-1; Mental Hygiene Law §§ 7.01, 7.07(c)(d). DSS administers the Medicaid program (medical assistance to needy persons) and is mandated to take legal action to obtain restitution of funds wrongfully received.

At request of the Commissioner of OMH and pursuant to Mental Hygiene Law § 31.28, the Supreme Court of the State of New York in an ex parte proceeding on October 20, 1986, appointed Federation Employment Guidance Service ("FEGS"), a not-for-profit social welfare agency, as temporary receiver of the BPRI facilities pending determination of the merits of the State's charges. After a hearing, the court continued the receivership, Compl. 99, and it remained in effect for eighteen months, until April 1988. Proceedings were referred by the Honorable Gabriel Krausman, Justice of the Supreme Court of the State of New York, to a Judicial Hearing Officer to hear and determine all issues in the case.

Following pretrial motions and discovery, Judicial Hearing Officer Carmine A. Ventiera ("JHO") presided over a ten month trial, which dealt with numerous issues including Easton's relationship with BPRI, its health care facilities, and certain real estate corporations; the leases between BPRI and Easton family realtors' Medicaid billing practices at the BPRI facilities; and quality of care at the BPRI facilities. The trial concluded on February 8, 1988. To date the JHO has not issued a decision on the merits of the case. A Memorandum Decision on December 18, 1989 was issued on one of the issues, resulting in an order that the receiver pay interim rent to the Easton family realty corporations. That order is currently on appeal.

The receiver continued to operate the facilities after the trial, and in April 1988, when the receivership apparently terminated, the State Office of Mental Health acquired the properties under the Eminent Domain Procedure Law ("EDPL")> Compl. 13, 103. Under Article 3 of the EDPL, the corporations were offered compensation based on the assessed valuation. The amount of the assessed value was challenged by the corporations and is currently being litigated in the New York Court of Claims

pursuant to procedures set forth in Article 5 of the EDPL.

Jurisdictional Matters and Immunity from Suit

IV. The Eleventh Amendment Bars Damage Claims Against The Defendants In Their Official Capacities

The Eleventh Amendment to the United States Constitution operates as an express limitation on federal court jurisdiction over any action in which a state is the real party in interest. Edelman v. Jordan, 415 U.S. 651, 663 (1974). To the extent that the defendants here are sued for damages in their official capacities, they also are immune from suit, since a money judgment against a state public servant in his or her official capacity would impose liability on the state itself. Brandon v. Holt, 469 U.S. 464, 471-72 (1985); Kentucky v. Graham, 473 U.S. 159, 169 (1985); see also Will v. Michigan Department of State Police, ___ U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 91989)(state employee acting in official capacity may not be sued for damages under 42 U.S.C. § 1983); DeVilar v. City of New York, 628 F. Supp. 80, 85 (S.D.N.Y. 1986)(damage claims against government agents barred by Eleventh Amendment). The defendants are thus entitled to dismissal of all the claims brought against them in their official as opposed to individual capacities, since each is or was an officer of the State of New York at times relevant to the matters alleged in the complaint and Easton's claims seek damages only.

V. Glickman Has Prosecutorial Immunity

A prosecutor may not be held liable under § 1983 in his or her individual capacity for acts in performance of official duties. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). The doctrine of Imbler has been extended to government attorneys handling administrative proceedings, Butz v. Econoou, 438 U.S. 478, 512-17 (1978), and to their initiation and defense of

civil litigation in federal and state courts, Barrett v. United States, 798 F.2d 565, 572 (2d Cir. 1986).

The exceptions to this rule of absolute prosecutional immunity include where a prosecutor "proceeds in the clear absence of all jurisdiction . . ., without any colorable claim of authority . . .," Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987), or is performing investigative and administrative rather than prosecutorial functions, Barbera v. Smith, 836 F.2d 96, 100 (2d Cir. 1987), cert. denied sub nom. Barbera v. Schlesinger, ___ U.S. ___, 109 S.Ct. 1338 (1989); see also Rudow v. City of New York, 822 F.2d 324, 328 (2d Cir. 1987).

Assuming the truth of all of plaintiff's allegations against Glickman, Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the federal claims against him must be dismissed, since none fall outside the reach of his official law enforcement duties for the State Attorney General. The complaint challenges Glickman's judgment and motives, see 182-184, but Easton makes no assertions that Glickman acted without jurisdiction. Every alleged wrongdoing by Glickman was in performance of his duties as chief litigator in People v. BPRI, such as speaking with clients and witnesses (Compl. 77, 86, 170, 1993), preparing and submitting court documents (Compl. 100, 102, 204, 206-208, 223). The general assertion that Glickman was involved in the "investigation and administration" of the case during the summer of 1985 does not sufficiently allege any non-prosecutorial acts since the complaint refers only to his communication with clients in preparation for actual litigation, not particular prior acts involving investigation and/or acquiring of evidence. Cf. Barbera, 836 F.2d at 100. See Compl. 76, 77, 167.

Accordingly, the federal claims against Glickman are dismissed on grounds of absolute immunity.

VI. Defendants Sweeney, Cournos and Patack Have Witness Immunity

In Brisco v. La Hue, 460 U.S. 325 (1983), the Supreme Court held that a defendant in a state criminal case may not assert a claim for damages under § 1983 against a police officer for alleged perjured testimony at the state trial. Accord, White v. Frank, 855 F.2d 956 (2d Cir. 1988). In Briscoe the Court extended the common law rule of absolute immunity for prosecutors and judges to the testimony under oath of government witnesses in certain circumstances. Id. 460 U.S. at 343.

The courts have applied the doctrine to other government officials whose affidavits, investigations and testimony are essential parts of the judicial process. See Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987)(absolute immunity for probation officers who prepare presentence reports). It thus applies to Easton's claims against the witnesses against him in People v. BPRI to the extent Easton's primary charge against Sweeney, Cournos and Patack is that they submitted allegedly false affidavits and lied during the State court trial. Under Briscoe and Dorman no civil rights action may be brought based on alleged perjury in connection with a court proceeding. Accordingly, the federal claims against these defendants qua witnesses must be dismissed.

The Complaint Fails to State a Federal Claim

VII. Easton's Claims under 42 U.S.C. §§ 1981, 1985 and 1988

Easton has alleged jurisdiction, inter alia, under 42 U.S.C. § 1981, 1985 and 1988, Compl. 15, 228. However, § 1981 applies solely to deprivation of rights on account of race, ancestry or ethnic characteristics. St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Zemsky v. City of New York, 821 F.2d

148, 150 (2d Cir.), cert. denied, 484 U.S. 965 (1987)(collecting cases), and similarly, § 185(3) protects individuals only against conspiracies based on animus toward a protected class. United Brotherood of Carpenters & Joiners, Local 610, AFL-CIO v. Scott, 463 U.S. 825 (1983); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). § 1988 sets forth the availability of attorneys' fees for prevailing plaintiffs under other civil rights statutes, but does not create an independent source of a legal claim.

Easton does not allege that he is a member of a protected class nor that he was deprived of a federal right because of his race, ancestry or ethnicity. Accordingly, his claims must be dismissed to the extent they purport to arise under these sections of the civil rights law.

VIII. Easton's Due Process Claims Under § 1983

Easton's alleges that defendants, acting under color of state law, deprived him of liberty and property without due process of law. To state a claim for deprivation of procedural due process under 42 U.S.C. § 1983, a person must establish the existence of a protected liberty or a property interest. See Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972); Walentas v. Lipper, 862 F.2d 414 (2d Cir. 1988), cert. denied, ___ U.S. ___, 108 S.Ct. 269 (1987). If the plaintiff has no protected liberty or property interest, "no process is 'due'." Webster v. Redmond, 599 F.2d 793, 796-97 (7th Cir. 1979), cert. denied, 444 U.S. 1039 (1980); Eichman v. Indiana State University Bd. of Trustees, 597 F.2d 1104, 1109 (7th Cir. 1979).

IX. Easton Has No Cognizable Property Interest

Easton alleges a deprivation of property in the State's revocation of BPRI's license, the placing of BPRI in receivership, and the State's condemnation by eminent domain of the holdings of the family-owned

realty corporations. However, Easton (as opposed to these various corporations who are not plaintiffs in this action) has no constitutionally protected property interest in any of these alleged losses since:

> [to] have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, 408 U.S. at 577 (further noting that claim of entitlement to property must arise from positive law of state).

With respect to the corporate-owned property, Easton has not alleged he is a shareholder of either realty corporation. He is the president, but he alleges that all shares were transferred to his children in 1967. Compl. 18. His lack of any ownership of these family-owned corporations precludes Easton from asserting a cause of action for deprivation of property right under the due process clause:

> The fact that the government . . . deprive[s] a person of his property . . . may have pecuniary impact on a variety of other persons whose fortunes are in one way or another linked to him -- his family, suppliers, [et al.]. In some instances the impact may be sufficient to establish that [the other persons] are 'adversely affected" or "aggrieved" for purposing of ordinary doctrine establishing judicial review of agency action. But unless the person are deprived of their own property, or a common law or statutory right, there is no basis for a claim that government has 'deprived" them of property.

Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980)(serious but indirect injury to insurance business

from IRS ruling does not implicate the company's "property rights").

Even were Easton a shareholder, he would not have standing to sue on the basis of injury to the corporation. Breiterman v. Elmar Properties, Inc., 123 A.D.2d 735, 507 N.Y.S.2d 206, 207 (2d Dept. 1986), appeal dism'd, 69 N.Y.2d 823, 513 N.Y.S.2d 1029 (1987). Under New York law (which here provides the "independent source" of property entitlement required by Roth, 408 at 577):

> [c]orporations have an existence separate and distinct from that of their shareholders . . ., and an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation.

New Castle Siding Co. v. Wolfson, 97 A.D.2d 501, 502, 468 N.Y.S.2d 20 (2d Dept. 1983), aff'd, 63 N.Y.2d 782, 481 N.Y.S.2d 70 (1984); accord Goldstein v. Consolidated Edison Co., 115 A.D.2d 34, 499 N.Y.S.2d 47 (1st Dept. 1986).

Easton for like reason has no protected property interest in BPRI's operating certificate or in continued funding for BPRI. BPRI was a not-for-profit corporation and Easton an ex-officio board member. Assuming these may constitute property interests for purposes of the due process clause,5 they were the property of BPRI, not Easton. Thus, any due process

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5 Due process guarantees do not extend to interests that are bestowed or withheld at the unfettered will of the governmental authority. Roth, 408 U.S. at 578; see also S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988); Eastway Construction Corporation v. City of New York, supra, 762 F.2d at 249-50.

right that was violated when BPRI was deprived of these interest is not Easton's to assert.

X. Easton Has No Protected Liberty Interest

Easton charges that defendants Sundram, Stavis, Rybaltowski and Saurack injured his reputation and his medical career by publishing the allegedly false results of their investigation of BPRI. Under the stark holdings of Paul v. Davis, 424 U.S. 693 (1976) and Wisconsin v. Constantineau, 400 U.S. 433 (1971), Easton has no constitutionally protected liberty interest in his good name unless defamation of it has caused deprivation of some distinct right recognized under law.

The recent cases of Neu v. Corcoran, 869 F.2d 662, 666 (2d Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 66 (1989) and Rudow v. City of New York, 822 F.2d at 330 (2d Cir. 1987), affirm the application of that holding to these facts. Plaintiffs in these cases alleged deprivation of a liberty interest as a result of governmental conduct that both stigmatized them and caused injury to their businesses. In Neu, the stigma "plus" was sanctions for selling insurance without a license; in Rudow it was injury to plaintiff's business reputation and loss of private job. The court held in these instances that these losses sustained by the plaintiffs were not to established rights under state law such that, when combined with the alleged defamation, they could be considered due process violations within the meaning of Paul v. Davis. Consequently, defendants in those cases were entitled to dismissal. Neu, 869 F.2d at 669; Rudow, 822 F.2d at 330. Easton's claim of loss of access to BPRI and injury to his career must, under the authority of Neu and Rudow, likewise be dismissed as not cognizable as a liberty interest under § 1983.

For the above reasons, Easton may not maintain an action for deprivation of process, even to challenge an "established state procedure" such as the ex parte receivership determinations authorized by MHL § 31.28(b)(1) and CPLR §§ 6301 and 6313. Whether or

not Easton is correct that it was the "state system itself," Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 91982), that deprived BPRI of process due it, or, as alternatively pleaded, a conspiracy of state actors who wrongfully abused the receivership process by invoking extraordinary procedures in circumstances where there was no "special need for a very prompt action," Fuentes v. Shevin, 407 U.S. 67, 91 (1972), quoted in United States v. Serafine, 889 F.2d 1258 (2d Cir. 1989), he has failed to allege facts that show Easton -- as distinguished from BPRI or family-owned realty corporations -- sustained a constitutionally cognizable deprivation. Accordingly, Easton's claim under the due process clause and § 1983 must be dismissed for failure to state a claim upon which relief may be granted.6

XI. Easton's RICO Claim

Easton's other federal law claim for relief alleges that all ten defendants are liable under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., ("RICO"). Easton alleges violations of subsections 1962(c) and (d), by mail fraud,

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6 Easton asserts other constitutional grounds for his civil rights claim but none adequately to sustain a motion under 12(b)(6). His allegations that his claim arises under the First and Eighth Amendments is not supported by leaded facts establishing a cause relating to deprivation of rights guaranteed thereby. His Fifth Amendment unjust compensation claim also necessarily fails since, as shown above, the property taken by the State is not alleged to have been owned by Easton. Finally, to the extent the complaint may be read to assert a malicious prosecution claim under § 1983, it fails as a matter of law since the proceeding the defendants prosecuted, having not yet been concluded, perforce has not "terminated in [Easton's] favor." Janetka v. Dabe, 892 F.2d 187, 189 (2d Cir. 1989)(noting that "favorable termination" of underlying proceeding is a "prerequisite to commencement" of a malicious prosecution action).

obstruction of justice and conspiracy with intent to defraud. Compl. 266-276.

Easton has failed satisfactorily to allege the necessary predicate offenses for a RICO claim. See 18 U.S.C. § 1961(1)(A). He does not charge defendants with any acts which, if true, would constitute the indictable crimes of mail fraud, pursuant to 18 U.S.C. § 1341, or obstruction of justice, pursuant to 18 U.S.C. § 1503. Although he has alleged defendants used the mails to transmit inaccurate information about him, Easton pleads no facts to show that the defendants schemed to deprive Easton of property. In Carpenter v. United States, 484 U.S. 19, 27 (1987), the Supreme Court set forth the mail fraud requirements of the relevant statutes as follows: "Sections 1341 and 1343 reach any scheme to deprive another of money or property by mans of false or fraudulent pretenses, representations, or promises." Id. (emphasis supplied). Here, as noted above, the complaint fails to allege Easton was deprived of "money or property" to which he had any right.

Moreover, Easton has not alleged the specific intent to engage in a scheme to defraud as is required under 18 U.S.C. § 1341. It is the law in this Circuit that the mail fraud statute requires a showing of such specific intent and that a plaintiff relying on it as a predicate offense must "provide some factual basis for conclusory allegations of intent." Beck v. Manufacturer's Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988); see also Manax v. McNamara, 842 F.2d 808 (5th Cir. 1988)(allegations that attorney and others formed RICO enterprise to destroy physician's medical practice failed to allege scheme to defraud under mail fraud statute). Easton has not pleaded facts that show a deliberate scheme on the part of defendants to defraud Easton and the state court so that they could destroy Easton's career.

The other predicate acts are also unsuccessfully pleaded. Obstruction of justice, which is

Easton's second alleged predicate offense, does not apply here because it requires an attempt to influence a juror in a criminal proceeding "by threats or force, 18 U.S.C. § 1503, which has not been alleged. The third alleged predicate offense, "conspiracy with intent to defraud," is not included in the list of statutory racketeering acts. 18 U.S.C. § 1961(1).

For these reasons, Easton fails satisfactorily to plead a RICO claim.

The State Law Tort Claims Are Dismissed

As Easton has failed to assert a federal cause of action under §§ 1981, 1983, 1985, 1988 or RICO, his only remaining claims are state common law tort actions. In light of the necessary dismissal of defendant's federal claims, the court declines to retain jurisdiction over the pendent state law claims. Carnegie Mellon University v. Cohill, 484 U.S. 343 (1988); Neu v. Corcoran, 869 F.2d at 670.

Conclusion

For failure of pleading, the complaint is dismissed.

It is so ordered.

New York, N.Y.
July 12, 1990

ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 91-7165

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of October, one thousand nine hundred and ninety-one.

Present: HON. JAMES L. OAKES, Chief Judge
HON. IRVING R. KAUFMAN
HON. JOHN M. WALKER, JR.

Circuit Judges.

KARL EASTON, M.D.,

Plaintiff-Appellant,

v

CLARENCE J. SUNDRAM; PAUL STAVIS; WALTER J. SAURACK; JOHN J. RYBALTOWSKI; BRUCE E. FEIG; FRANCINE COURNOS; PAUL GLICKMAN; LOUIS J. PATACK; KATHLEEN SWEENEY and ILENE MARGOLIN,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith
Clerk

By: Edward J. Guardaro
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 91-7165

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of December, one thousand nine hundred and ninety-one.

Present: HON. JAMES L. OAKES, Chief Judge
HON. IRVING R. KAUFMAN
HON. JOHN M. WALKER, JR.

Circuit Judges.

KARL EASTON, M.D.,

Plaintiff-Appellant,

v

CLARENCE J. SUNDRAM; PAUL STAVIS; WALTER J. SAURACK; JOHN J. RYBALTOWSKI; BRUCE E. FEIG; FRANCINE COURNOS; PAUL GLICKMAN; LOUIS J. PATACK; KATHLEEN SWEENEY and ILENE MARGOLIN,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, Karl Easton.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, Karl Easton.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

(2)

No. 91-1460

SUPREME COURT, U.S.
FILED
APR 7 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KARL EASTON, M.D.,

Petitioner,

—against—

CLARENCE J. SUNDRAM, PAUL STAVIS, WALTER E. SAURACK, JOHN J. RYBALTOWSKI, BRUCE E. FEIG, FRANCINE COURNOS, PAUL GLICKMAN, LOUIS J. PATACK, KATHLEEN SWEENEY and ILENE MARGOLIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

A. The Court Below Correctly Ruled That Petitioner's Allegations Of Malicious Civil Prosecution Fail To State A Claim Under 42 U.S.C. § 1983 6

B. The Court Below Correctly Declined To Expand The Definition Of A Constitutional Claim Based On Defamation As Set Forth By This Court in *Paul v. Davis*, *Board of Regents v. Roth* And *Siegert v. Gilley* 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	PAGE
Blum v. Yaretsky, 457 U.S. 991 (1982)	10
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	2, 9
Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985)	7
Harlow v. Fitzgerald, 457 U.S. 80 (1982)	7
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	7, 8
Juidice v. Vail, 430 U.S. 327 (1977)	8
Lebbos v. Judges of the Superior Court, Santa Clara County, 883 F.2d 810 (9th Cir. 1989)	10
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)	8
Neu v. Corcoran, 869 F.2d 662 (2d Cir.), *cert. denied*, 493 U.S. 816 (1989)	5, 6, 9
Northern Westchester Professional Park Associates v. Town of Bedford, 60 N.Y.2d 492 (1983)	2
Parratt v. Taylor, 451 U.S. 527 (1981)	6
Paul v. Davis, 424 U.S. 693 (1976)	*passim*
People v. BPRI, No. 91-06269	2, 4
Siegert v. Gilley, __ U.S. __, 111 S.Ct. 1789 (1991)	9
Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990)	7
White v. Frank, 855 F.2d 956 (2d Cir. 1988)	5, 7
Younger v. Harris, 401 U.S. 37 (1971)	8

PAGE

Constitutional and Statutory Provisions

18 U.S.C. § 1961 4

42 U.S.C. § 1983 ..... *passim*

New York Mental Hygiene Law § 31.28 ..... 3, 10

New York Mental Hygiene Law Article 45 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1460

KARL EASTON, M.D.,

Petitioner,

—against—

CLARENCE J. SUNDRAM, PAUL STAVIS, WALTER E. SAURACK, JOHN J. RYBALTOWSKI, BRUCE E. FEIG, FRANCINE COURNOS, PAUL GLICKMAN, LOUIS J. PATACK, KATHLEEN SWEENEY and ILENE MARGOLIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioner, a psychiatrist charged by the State of New York with Medicaid and real estate fraud, seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming a decision of the District Court for the Southern District of New York dismissing his complaint. The opinion, reported at 947 F.2d 1011 (2d Cir. 1991) and reproduced in Appendix A to the Petition (Pet. 1a-14a), held, *inter alia*, that petitioner's allegations of malicious civil prosecution failed to rise to the level of a constitutional violation under 42 U.S.C. § 1983. The court further held that respondents were entitled to qualified immunity from petitioner's

claim that he was deprived of a protected liberty interest under the Fourteenth Amendment, in view of the court's prior interpretations of *Paul v. Davis*, 424 U.S. 693 (1976) and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

The petition should be denied because the decision of the Court of Appeals was correct in all respects and the petition raises no significant or important questions worthy of review by this Court. The decision below was consistent with this Court's rulings on the limited circumstances in which a state tort claim asserts a deprivation of constitutional magnitude, and petitioner does not claim otherwise. He seeks, rather, this Court's opinions on broad constitutional questions which, the court below concluded, were not necessary to the decision in this case and whose resolution by this Court will have no impact on the parties to this dispute, since respondents are entitled to qualified immunity with respect to both claims.

In addition, the petition neglects to advise the Court that the dismissal of the underlying New York State civil enforcement action,[1] upon which petitioner's claims here are based (A. 319-411)[2], is presently scheduled for an expedited appeal to the Appellate Division, Second Department. That court is authorized to review the facts *de novo*, particularly after a bench trial. *See Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492 (1983). Should the dismissal of the State's complaint be reversed, all of petitioner's claims will become moot, thus further militating against issuance of the writ.

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1 *People of the State of New York, New York State Office of Mental Health and New York State Department of Social Services v. Brooklyn Psychosocial Rehabilitation Institute, 3 Lafayette Avenue Corporation, Cobble Hill Center Corporation, Dr. Karl Easton, Jacqualine Easton, Irving Link and Theodore Rosten*, App. Div. Index No. 91-06269 ("*People v. BPRI*").

2 Second Circuit Appendix, hereinafter "A".

STATEMENT OF THE CASE

Petitioner commenced this federal civil rights suit after a State civil enforcement action charged that he had enriched his family-owned realty corporations by fraudulently billing Medicaid for non-existent services while operating a dangerously sub-standard mental health facility (BPRI) and improperly retaining patient personal funds. (SA. 121-146).[3] The civil suit was based upon evidence of fiscal and patient abuse uncovered by the State agency plaintiffs. (SA. 9, 36-72).

Upon application by the plaintiffs, two justices of the New York Supreme Court authorized the appointment of a receiver to protect the mentally ill clients of the facility, pursuant to New York State Mental Hygiene Law ("MHL") § 31.28. Following a lengthy trial before a Judicial Hearing Officer ("JHO"), the case was dismissed on the grounds that the plaintiffs had failed to prove their allegations. As noted, that determination is currently on appeal.

Before the JHO issued a decision in the State case, petitioner brought this action in the United States District Court for the Southern District of New York seeking $40 million in damages against respondents in their individual and official capacities. The *pro se* complaint, consisting of 310 paragraphs of allegations and 1100 pages of exhibits from the trial, alleged that ten officials from four State agencies, including attorneys, psychiatrists, mental health and fiscal analysts, agency administrators and consultants,[4] conspired to

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3 Second Circuit Supplementary Appendix, hereinafter "SA.".

4 The defendants and their affiliations are as follows:

1) *Clarence Sundram*, Chairman of the New York State Commission on Quality of Care for the Mentally Disabled (an independent oversight agency established by Article 45 of the New York Mental Hygiene Law) ("CQC").

2) *Paul Stavis*, Counsel to CQC.

3) *Walter E. Saurack*, Chief of Fiscal Investigations/Cost Effectiveness Bureau, CQC.

(*Footnote continued on next page*)

intentionally lie about petitioner's activities, persecute him, defame him, deprive him of his property and of his job at BPRI, and thus violate his constitutional rights and the provisions of the "Civil RICO" statute, 18 U.S.C. § 1961 *et seq.* Petitioner also alleged that respondents committed numerous common law torts including negligence, defamation and malicious prosecution.

On July 12, 1990, in an unreported decision, the district court (Sweet, J.) dismissed the complaint for failure to state a federal claim. (Pet. 15a-29a). After the JHO dismissed the State complaint, petitioner forwarded the decision to the district court and moved for reargument. The court denied the motion on January 14, 1991. (A. 412).

Petitioner raised several issues on appeal to the Second Circuit Court of Appeals, only two of which are relevant to this petition: (a) whether petitioner's claim of "malicious civil prosecution," based on *People v. BPRI*, rises to the level of a constitutional violation, and (b) whether allegedly defamatory statements in a State agency report, combined with the receiver's termination of petitioner from his position at BPRI, constituted "deprivation of liberty without due process of law."

The Court of Appeals affirmed the district court's dismissal of the complaint. The court acknowledged that a criminal prosecution that ends in acquittal may, in some cases, give rise to a cause of action under 42 U.S.C. § 1983, but

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4) *John J. Rybaltowski*, Program Cost Analyst, CQC.

5) *Bruce E. Feig*, Executive Deputy Commissioner, New York State Office of Mental Health ("OMH").

6) *Louis J. Patack*, Assistant Counsel, OMH.

7) *Francine Cournos, M.D.*, Psychiatric Consultant, OMH.

8) *Kathleen Sweeney*, Standards Compliance Analyst, OMH.

9) *Ilene Margolin*, former Special Assistant to the Governor of the State of New York.

10) *Paul Glickman*, former Assistant Attorney General of the State of New York.

found no precedent and no grounds for extending the constitutional claim to a civil enforcement action.[5] Stating that to the best of its knowledge "no other court to have considered the question has [so] held" (Pet. App. 12a), the court noted that "criminal malicious prosecution typically implicates constitutional rights secured by the fourteenth amendment, such as deprivation of liberty, that are not automatically implicated in a malicious civil suit." (Pet. 12a). Such rights include freedom from extreme and shocking official misconduct such as physical abuse, detention, unequal protection of the law or invasion of privacy, none of which are alleged here. Nor is such conduct generally implicated in a civil regulatory action, "even if broad-based and aggressive." Pet. 13a.

Absent deprivation of such fundamental rights, the court below rejected the argument that the alleged malicious civil prosecution in this case was anything more than an actionable state tort claim. It found that petitioner was not "subjected to a misuse of the legal process so egregious as to work a deprivation of a constitutional dimension." (Pet. 13a-14a).

With respect to petitioner's claim that he was deprived of liberty without due process of law, the court held that defendants were entitled to qualified immunity since "the law of this Circuit has not clearly established that the conduct that Easton complains of rises to the level of a constitutional violation, rather than simply a state tort." (Pet. 9a). Analyzing its prior opinions, including *Neu v. Corcoran*, 869 F.2d 662 (2d Cir.), *cert denied*, 493 U.S. 816 (1989), in light of this Court's definition of "stigma plus" in *Paul v. Davis*, 424 U.S. at 701, the court adhered to its prior conclusion that "our cases have not 'clearly established that defamation

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5 The court also reiterated the necessity that a claimant allege all the necessary elements of the state tort of malicious prosecution (Pet. 11a), *i.e.*, (1) initiation of a criminal action against the plaintiff, (2) with malice, (3) without probable cause and 4) termination of the criminal proceedings in plaintiff's favor. *See White v. Frank*, 855 F.2d 956, 959, n.2 (2d Cir. 1988).

occurring other than in the course of dismissal from a government job or termination of some other legal right o[r] status will suffice to constitute a deprivation of a liberty interest.' " (Pet. 9a, *quoting Neu v. Corcoran*, 869 F.2d at 667).

The court additionally rejected petitioner's "strained argument" that his termination by a court-appointed receiver constituted loss of government employment. Questioning whether the receiver was a state actor in this context, the court noted that, in any event, petitioner was terminated from private, not public employment. (Pet. 10a-11a).

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Ruled That Petitioner's Allegations Of Malicious Civil Prosecution Fail To State A Claim Under 42 U.S.C. § 1983.

This Court has consistently refused to elevate state common law torts to injuries of a constitutional magnitude. As stated in the oft-quoted comment in *Paul v. Davis*, 424 U.S. at 701, the Court should not "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. . . . [T]he procedural guarantees of the Due Process Clause cannot be the source for [a body of general federal tort] law." *Accord Parratt v. Taylor*, 451 U.S. 527, 544 (1981).

Notwithstanding these decisions, petitioner seeks certiorari expressly for the purpose of creating and defining a new federal cause of action in which an unsuccessful civil action by state officials, allegedly brought with malice and without probable cause, would provide the basis for a federal civil rights remedy as well as a state common law tort claim for damages, despite the absence of physical abuse or incarcera-

tion. As the court below stated, no reported decision has recognized such a federal claim.[6]

Petitioner's assertion that there is a conflict among the circuit courts is thus inaccurate. It is only with respect to *criminal* malicious prosecution that any such differences exist. Thus, some courts have recognized such a claim based on the due process clause where the plaintiff has alleged the loss of physical liberty, through false arrest or imprisonment. *See e.g.*, *White v. Frank*, 855 F.2d at 957. As petitioner correctly notes, however, several courts have refused to elevate this tort to a constitutional claim, *see Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985), or have done so only in the face of abusive criminal proceedings so egregious as to shock the conscience. *See Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990). In this case, in contrast, petitioner alleges no loss of physical liberty and no analogous deprivation of fundamental constitutional rights. He therefore presents no basis for this Court to "examine and elucidate" the contours of a constitutional claim for civil malicious prosecution in this case. (Pet. 12).

In an effort to cure this defect, petitioner asserts that the loss of his job and his professional reputation "had an enormous negative effect upon him" which was "at least as great as if he had been arrested and falsely charged by state criminal authorities." (Pet. 10-11). Petitioner fails to articulate, however, how this "negative effect" implicated rights guaranteed by the Constitution, except by reference to petitioner's proposed expansion of this Court's and the lower court's definition of "stigma plus" to include loss of a private job. Without a State deprivation of such protected rights, petitioner's argument for a federal cause of an action under section 1983 for malicious civil prosecution remains flawed.

Petitioner's analogy to *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) and its progeny to bridge the gap between civil

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6 The respondents in this case accordingly would be entitled to qualified immunity from suit even if such a new cause of action were to be established by this Court. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

and criminal prosecutions misreads the significance of those cases. *Huffman* extended the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) to certain state civil proceedings. For the limited purpose of determining the propriety of federal intervention in on-going state court proceedings, *Huffman* recognized that civil and criminal actions alike serve important state purposes and that considerations of comity and federalism dictate federal judicial restraint in both instances. 420 U.S. at 604.

Huffman noted the similarity between the civil and criminal statutes at issue in that particular case. It did not base its holding primarily on that likeness, however, or minimize the differences between criminal and civil proceedings for all purposes, as petitioner seeks to do. Indeed, the Court later applied the *Huffman* doctrine to civil proceedings without regard to any resemblance to a criminal or quasi-criminal action, based *solely* on the determination that the "federal-court interference" would " 'unduly interfere[ ] with the legitimate activities of the Stat[e].' " *Juidice v. Vail*, 430 U.S. 327, 335-336 (1977), *quoting Younger v. Harris*, 401 U.S. at 44; *see also Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982) (abstention from interference in proceedings "necessary for the vindication of important state policies or the functioning of the state judicial system").

Petitioner ignores this over-riding concern for the principles of federalism and urges the opposite result. Rather than abiding by the spirit of these cases, which counsel deference to legitimate state judicial procedures, *see Juidice v. Vail*, 430 U.S. at 336, he seeks a federal constitutional overlay on state tort law, which, in this case, provides full avenues of relief for petitioner's claim.

Petitioner's interpretation of *Huffman* has troublesome practical implications. A federal claim for state civil malicious prosecution necessarily would encompass thousands of regulatory schemes in each state, and open the federal floodgates to claims by disgruntled subjects of local regulation.

Such expansion of federal litigation is unwarranted given the panoply of remedies available under state law. Indeed, petitioner himself has had more than one full and fair post-deprivation hearing in New York State courts, and has notified the State of his intent to pursue his tort law remedies as well.

B. The Court Below Correctly Declined To Expand The Definition Of A Constitutional Claim Based On Defamation As Set Forth By This Court in *Paul v. Davis*, *Board of Regents v. Roth* And *Siegert v. Gilley*.

In *Paul v. Davis*, 424 U.S. 693, this Court articulated a clear test for determining when an injury to reputation may constitute a breach of rights guaranteed by the Fourteenth Amendment. The defamation by a state official must have occurred in connection with "governmental action . . . [that] deprived the individual of *a right previously held under state law*." *Id.* at 7-8. (emphasis supplied). The "right" may be a government job, as in *Board of Regents v. Roth*, 408 U.S. 564, or a "status previously recognized by state law . . . [which is] officially remov[ed] . . . from the recognition and protection previously afforded by the State. . . ." *Paul v. Davis* 424 U.S. at 711. In recently reaffirming this "stigma plus" test in *Siegert v. Gilley*, ____ U.S. ____, 111 S.Ct. 1789, 1794 (1991), this Court further noted that the alleged defamation must be uttered "incident to" the termination of the protected right.[7]

The court below has declined on several occasions, including the decision below, to broaden this "stigma plus" test to include injuries *not* expressly protected by state law, *see Neu v. Corcoran*, 869 F.2d at 667, such as petitioner's loss of private employment and his alleged "professional injury." The

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7 It is unclear how petitioner could meet the "incident to" standard in any event since he alleges different components of the "stigma plus" claim against different respondents and waived his conspiracy claim below. *See* Complaint, ¶¶ 241-246 and 261-263 (A. 51-53), charging respondents Sundram, Stavis, Rybaltowski and Saurack with defamation and respondent Feig with wrongful dismissal.

petitioner proffers no reasons for this Court to review the determination below other than his argument that the "state appointed receiver" must be considered a "state actor." Pet. 13. The receiver, however, was a not-for-profit agency appointed by two members of the State judiciary. Although the State executive agencies requested the appointment, the receiver had independent statutory authority and was directly accountable at all times to the State court. *See* New York State Mental Hygiene Law § 31.28. It is therefore highly doubtful that the conduct of the receiver can be attributed to the State for the purposes of meeting the test of state action. *See Blum v. Yaretsky*, 457 U.S. 991 (1982) (nursing home's eligibility determinations, although designed to meet state regulatory mandates, not state action).[8]

Furthermore, since it is indisputable that the receiver terminated petitioner from a private job, he was not deprived of any right or "status previously recognized under state law." *Paul v. Davis*, 424 U.S. at 711. Therefore, even under petitioner's theory, he has presented no "stigma plus" question worthy of this Court's attention.

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8 Petitioner's reliance on *Lebbos v. Judges of the Superior Court, Santa Clara County*, 883 F.2d 810, 818 n.10 (9th Cir. 1989) is thus inapposite. In that case, plaintiff sued both the receiver and the judge who appointed him to enforce an allegedly unconstitutional state law.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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